Third Party Reports & *Medical Expert: Reports and Testimony*: Preliminary Consultation Report

Introduction

CPSO is currently reviewing its *Third Party Reports* and *Medical Expert: Reports and Testimony* policies.

As part of the review process, an external consultation was undertaken from December 2019 to February 2020. Invitations to participate in the consultation were sent via email to a broad range of stakeholders, including all Ontario physicians. In addition, a general invitation to provide feedback was posted on CPSO's website and social media platforms. Feedback was collected via regular mail, email, an online discussion forum, and an online survey.

This report summarizes only the stakeholder feedback that was received through the online survey.

Caveats

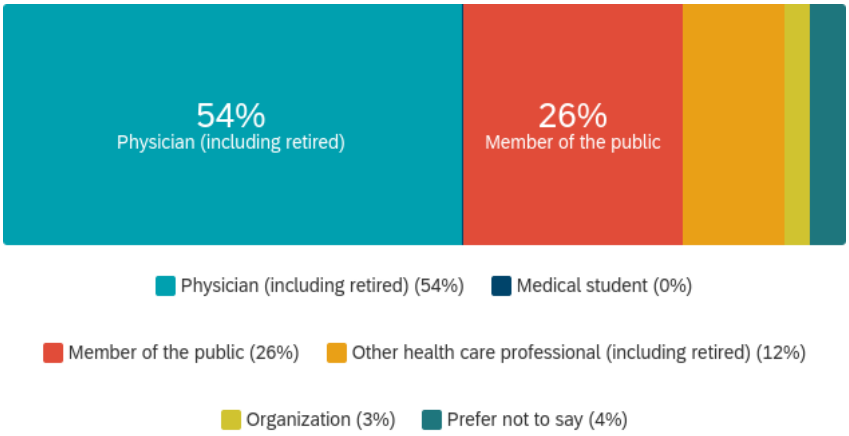
Participation in this survey was voluntary. As such, no attempt has been made to ensure that the sample of participants is representative of any sub-population.

In the interest of space, stakeholder feedback to open-ended questions has been summarized to capture key themes and ideas.

Who we heard from:

A total of 158 surveys were received in response to this consultation. The vast majority of respondents were from Ontario (92%) and slightly more than half (52%) were physicians.

Respondent Demographics



Organizational respondents included:

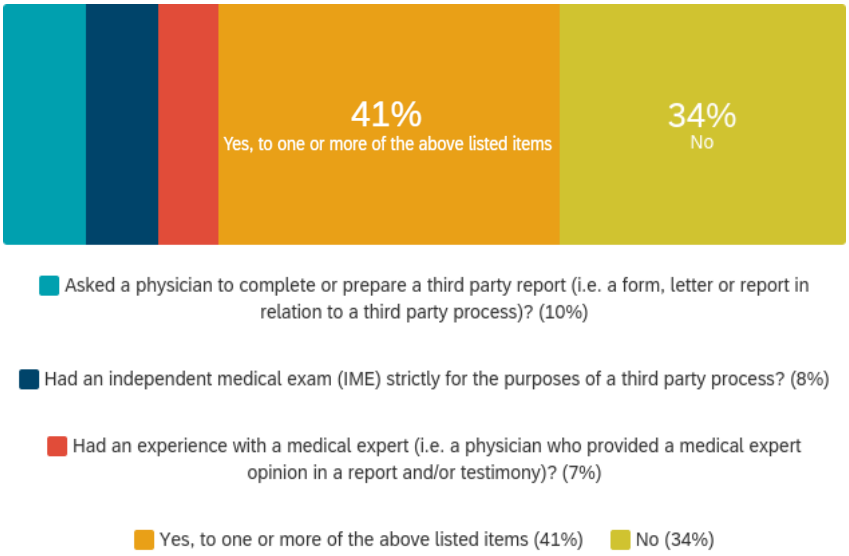
- AssessMed
- Acquired Brain Injury Survivor Solutions (ABISS)
- Functional Rehabilitation Inc.
- Life insurance industry representative
- Workers' compensation representative

The following questions were posed to all survey respondents (except organizational respondents).

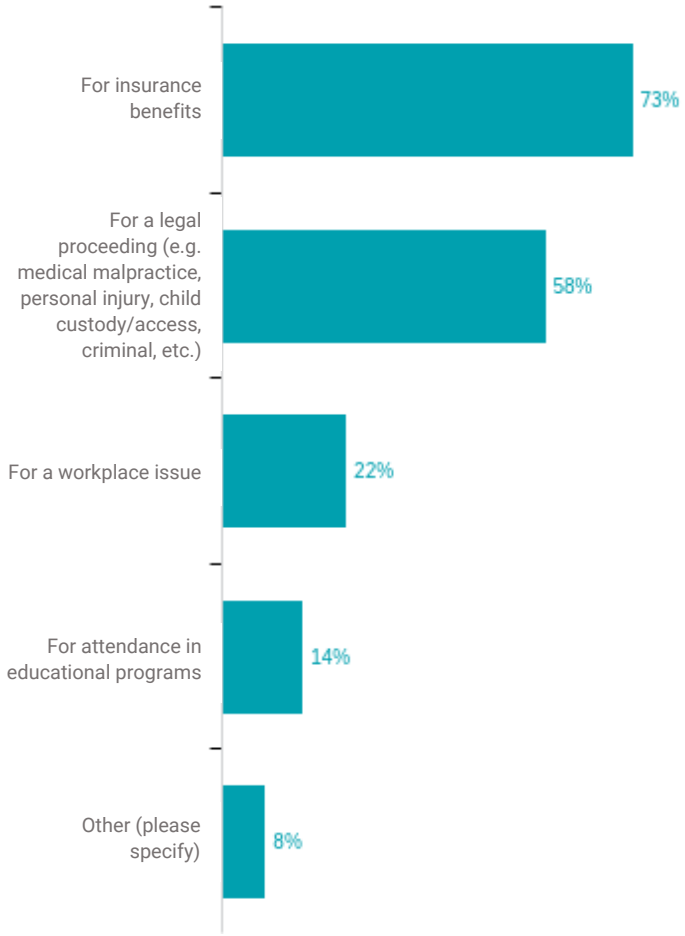
We are interested to hear about your experiences (if you've had any) with third party reports, independent medical examinations (IMEs), and medical experts, in the context of a third party process (i.e. for a purpose other than the provision of health care).

For physicians, medical students, and other health care professionals, please answer the following section of questions from the perspective of any experience you have had as a patient.

Q1: Have you ever: (n=153)



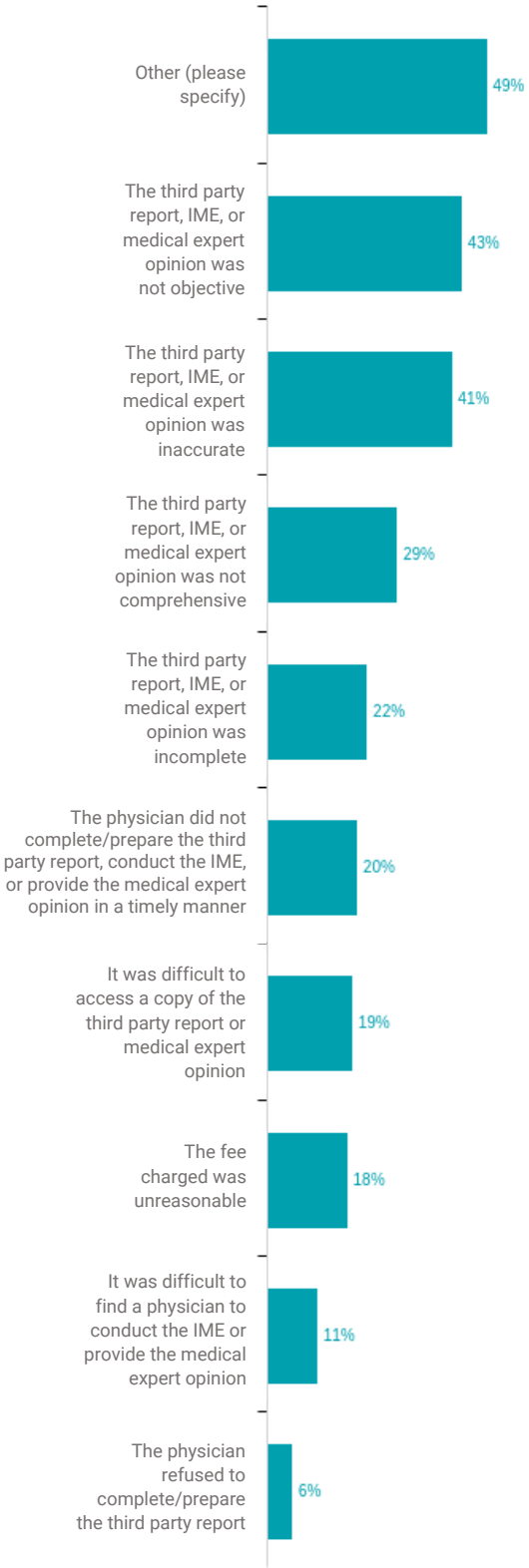
Q2. What was the reason for the third party report, IME, or medical expert opinion? (Select all that apply) (n=90)



"Other" responses included: (n=7)

- Automobile accident;
- Capacity assessment and CPSO investigation;
- Emigration;
- Insurers' examinations;
- Life insurance and prequalification for employment;
- New insurance application; and
- To better direct their patient's therapies.

Q3. Have you encountered any of the following issues in regard to third party reports, IMEs, or medical expert opinions? (Select all that apply) (n=90)



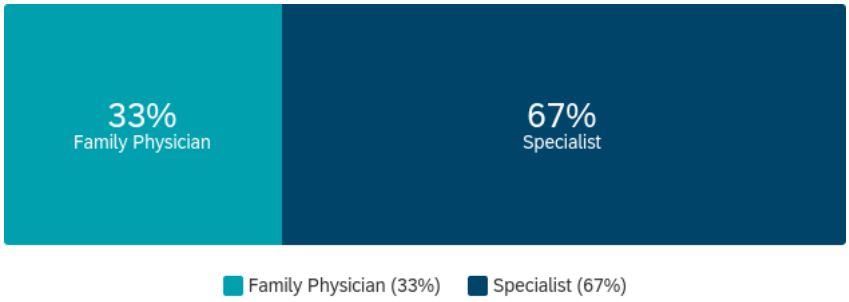
Nearly half of the respondents who selected “Other” (n=44) indicated that they had not experienced any issues regarding third party reports, IMEs, or medical expert opinions.

Other issues reported by respondents included:

- Perceived bias on the part of the physician in favour of the requesting party;
- Perception that insurers go to great lengths to deny claims;
- Inappropriately brief or rushed examinations;
- Unprofessional conduct by the physician, which some respondents described as abusive, argumentative, callous, disrespectful, and rude; and
- The diagnosis or opinion or provided was outside the physician’s scope of practice.

The following questions were posed only to physician respondents:

Q4. What kind of physician are you? (n=82)



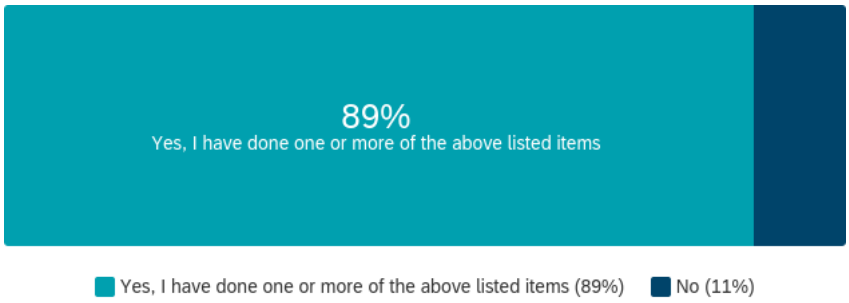
Q5. If applicable, please specify your area of focus in your family practice or your area of speciality: (n=46)

Physician respondents listed the following family practice areas of focus and specialities:

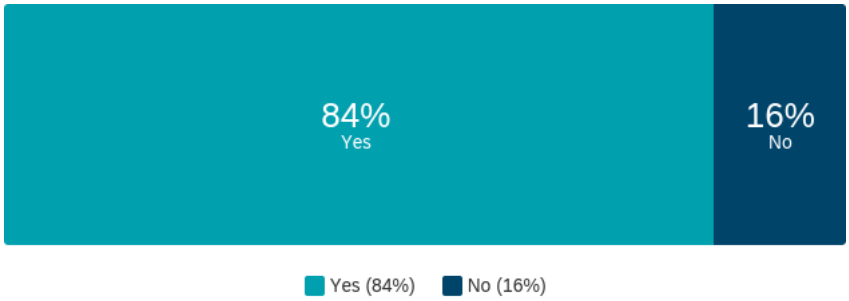
- Addiction Medicine
- Chronic Pain
- Critical Care
- Electrodiagnostic Medicine
- Emergency Medicine
- Forensic Psychiatry
- General Family Practice
- General Pediatrics
- General Surgery
- Internal Medicine
- Laboratory Medicine and Pathology
- Maternal-Fetal Medicine
- Neurology
- Neurosurgery
- Occupational Medicine
- Orthopaedic Surgery
- Orthopedics
- Pain Medicine
- Pediatric Ophthalmology
- Physical Medicine
- Psychiatry
- Radiology
- Rehabilitation Medicine
- Sport and Exercise Medicine
- Public Health and Preventative Medicine
- Urology

Q6. Have you ever:

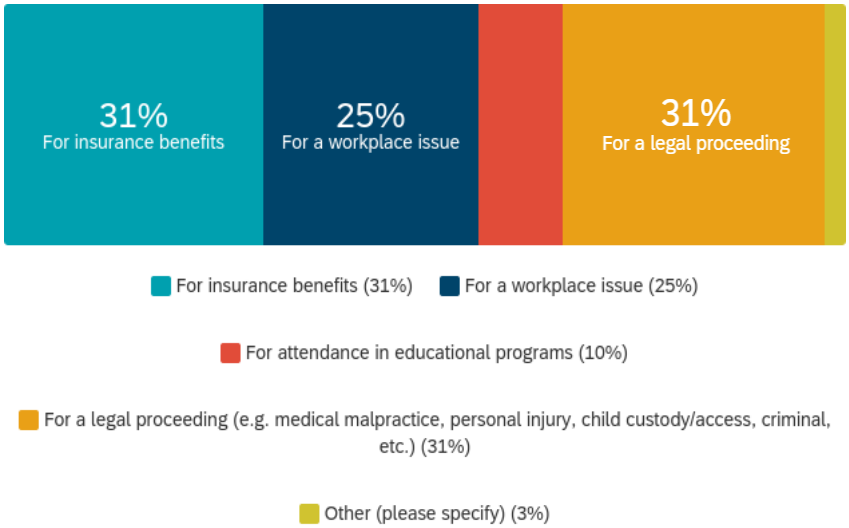
- **Completed or prepared a third party report (i.e. a form, letter, or report in relation to a third party process)?**
- **Conducted an independent medical examination (IME) strictly for the purposes of a third party process?**
- **Acted as a medical expert (i.e. provided a medical expert opinion in a report and/or testimony)? (n=82)**



Q7. Do you currently provide direct patient care? (n=82)



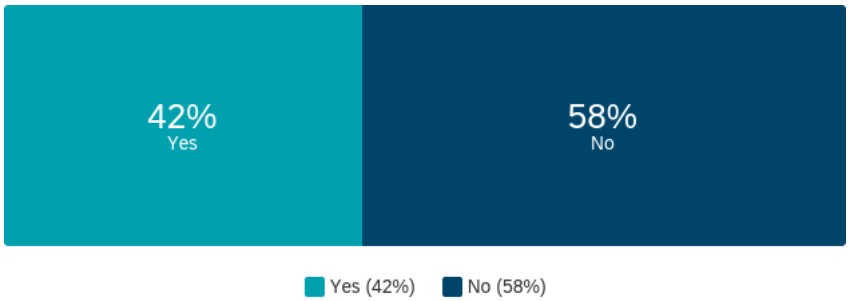
Q8. What was the reason for the third party report, IME, or medical expert opinion? (Select all that apply) (n=73)



"Other" responses included: (n=5)

- Capacity assessment;
- Critical illness benefit;
- Driver license forms;
- Government forms; and
- Return to school, hockey, etc.

Q9. Have you ever found something suspicious (e.g. an unexpected significant clinical finding, a condition which raises serious concerns, or a symptom/condition that requires essential intervention) when completing/preparing a third party report, conducting an IME, or providing a medical expert opinion? (n=73)

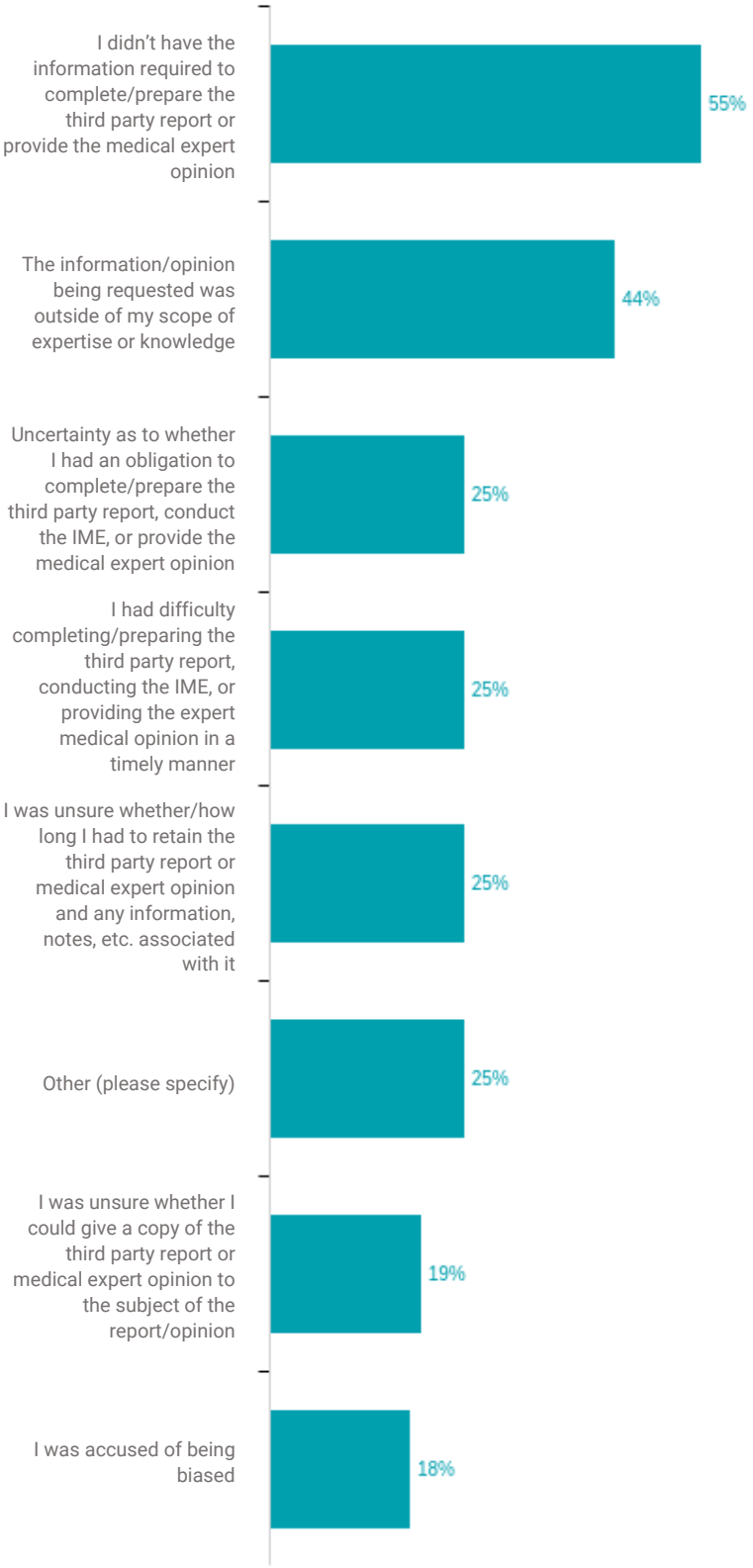


Q10. If yes, please describe the circumstances surrounding the suspicious finding and what you did with that information. (Optional) (n=24)

When asked to elaborate, physician respondents provided a range of responses:

- Some informed the subject of the IME and/or informed others (e.g. the subject's treating physician, the lawyer who retained them, and/or the requesting party).
    - Several physicians recommended the subject of the IME follow up with their family physician for treatment, and one followed up with the subject's family physician directly (with the subject's consent to do so).
- Several physicians arranged care in cases that required essential intervention or risk of harm (e.g. called for an urgent psychiatric assessment, called for an ambulance to hospital, and/or contacted the Emergency Department).
- One physician indicated that if the findings were relevant to the IME, it was included with the subject's consent.
- One physician investigated and treated the subject of the IME themselves, whose condition (atrial fibrillation) was not previously known or symptomatic.

Q11. Have you encountered any of the following issues when completing/preparing a third party report, conducting an IME, or providing a medical expert opinion? (n=73)



Two thirds of the physician respondents who selected “Other” (n=18) indicated that they have not encountered any of the above issues, and some believed the survey response options presented were negatively biased towards physicians.

Those physician respondents who did encounter issues reported concerns around fees and being recorded without their consent.

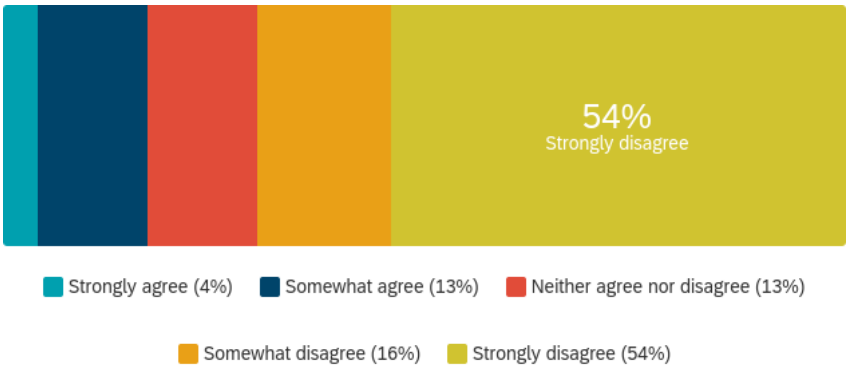
The following questions were posed to all survey respondents:

The following questions will ask you about some issues related to third party processes.

At times, third party reports may be drafted by someone other then the physician (e.g. administrative staff, insurer, assessment firm, etc.). This practice is called “ghostwriting.” The physician may then edit/finalize the report and submit it to the third party as their own.

Q12. Please indicate the extent to which you agree or disagree with the following statement:

It is appropriate for third party reports to be ghostwritten. (n=146)



Q13. Please feel to elaborate. (n=74)

Over two thirds of survey respondents disagreed that it is appropriate for third party reports to be “ghostwritten.” Comments from those respondents included:

- Several respondents were concerned “ghostwriting” would be inherently biased or unethical (particularly when the requesting party writes the report).
- Several respondents were concerned there is a lack of accountability or oversight for “ghostwriters,” and some members of the public felt reports should only be written by qualified physicians regulated by CPSO.

Some respondents believed the appropriateness of “ghostwriting” depends on the nature and the extent of the "ghostwriting” or the experience and competency of the “ghostwriter.”

- Several respondents felt the objective medical opinion should only be provided by physicians, but some supported impartial assistance in writing and editing the report.

Comments from respondents who agreed "ghostwriting" is appropriate felt it is less demanding of physicians' time and its prohibition would increase the costs of reports.

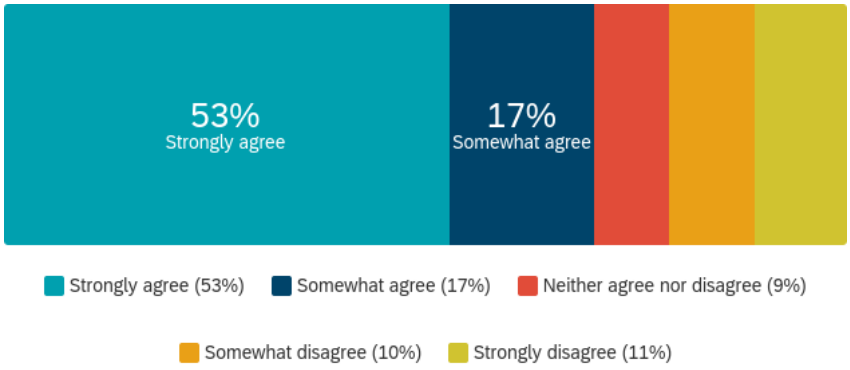
- Some respondents felt some standard elements of the report could be "ghostwritten" and the use of templates could be appropriate.

Several physician respondents highlighted the importance of including all authors' names in the report in the event that further elaboration is needed, or the report is later challenged.

Some physicians may only do third party work (e.g. conduct independent medical examinations and write third party reports, provide medical expert opinions) and are not actively providing direct patient care.

Q14. Please indicate the extent to which you agree or disagree with the following statement:

In order to maintain the clinical knowledge and expertise required to assess and/or provide an opinion on a matter for a third party process, physicians must be actively practicing medicine which includes direct patient care. (n=146)



Q15. Please feel free to elaborate. (n=57)

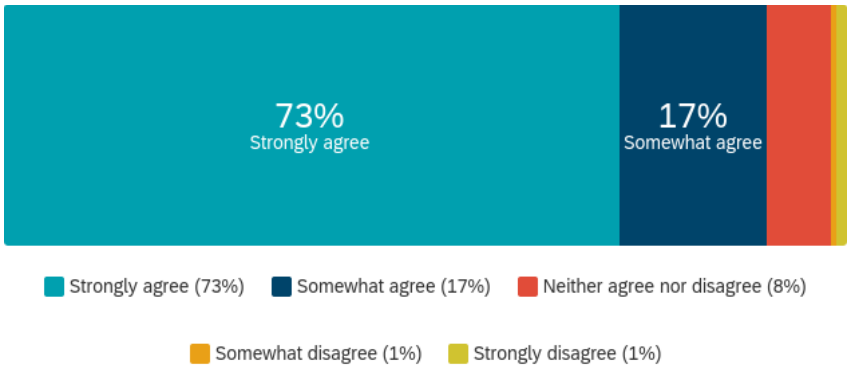
While the majority of survey respondents agreed that physicians must be actively practicing medicine, some physician respondents highlighted the following considerations:

- Active clinical practice may not be required depending on:
  - the physician's experience, clinical background, or specialty;
  - the degree or type of injury, nature of the report, or medico-legal context; and
  - how long the physician has been retired for (i.e. between two to five years is acceptable) or if they are considered "semi-retired."
- There are other ways for physicians to maintain their knowledge and expertise, including teaching or supervising, research, or continuing medical education (CME) requirements.
- A few were concerned that some physicians who only do third party work "lose their touch" with respect to best practices, patient care expectations, or social determinants of health.

The following questions will ask you about the current *Third Party Reports* and *Medical Expert: Reports and Testimony* policies.

CPSO's current *Third Party Reports* and *Medical Expert: Reports and Testimony* policies require that physicians communicate the nature of the role the physician will play in the third party process (e.g. not a treating role but providing information/opinions for a third party process).

Q16. Please indicate the extent to which you agree or disagree with this requirement. (n=144)



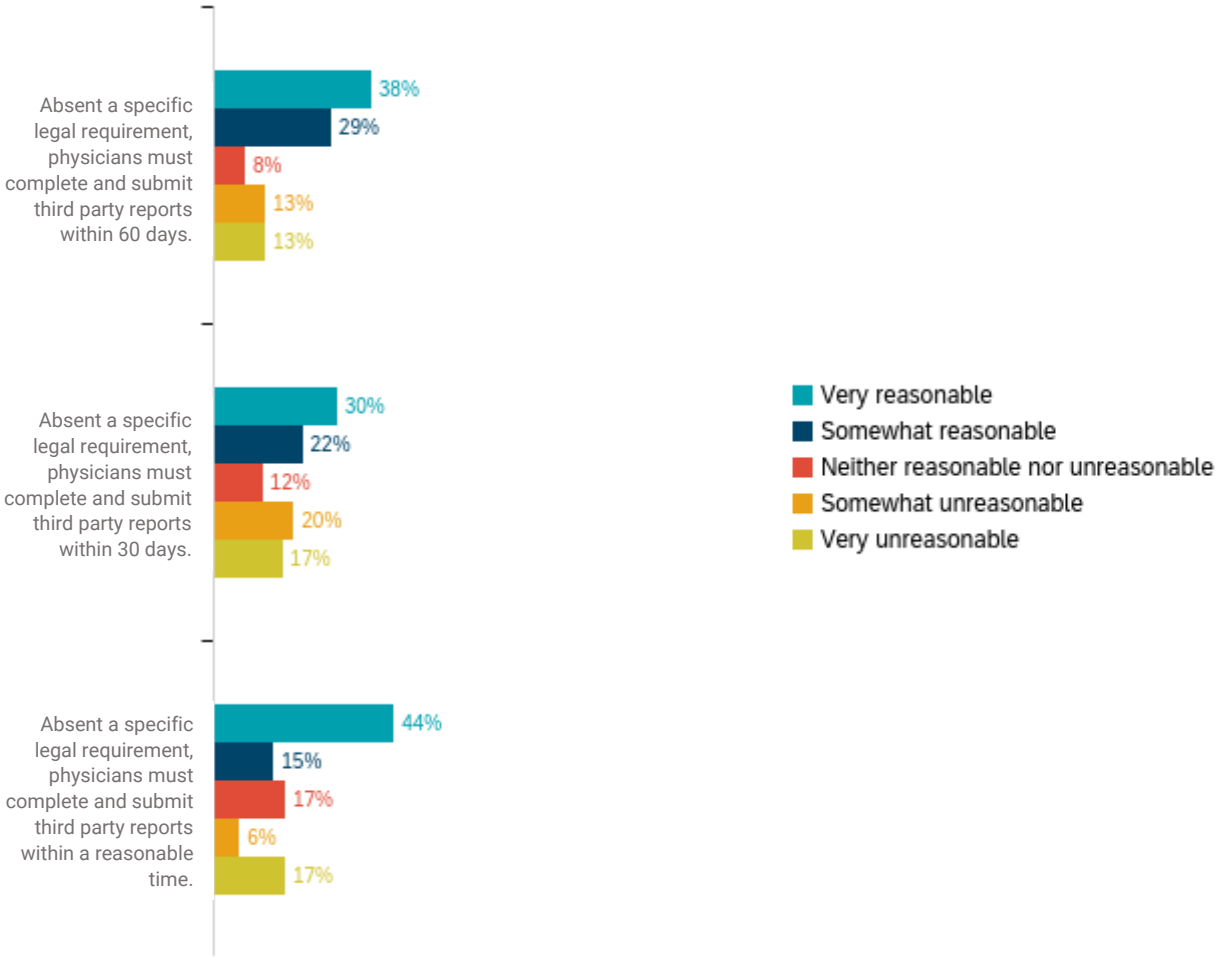
Q17. Please feel free to elaborate. (Optional) (n=30)

The majority of respondents agreed that physicians should communicate the nature of the role they will play in the third party process.

- When asked to elaborate, comments from physician respondents included:
  - The nature of the role should be made clear to the subject by the requesting party before the physician ever interacts with the subject;
  - Physicians should ensure the subject understands the encounter and that the physician's role is impartial and therefore they will not advocate for the subject;
  - Reports should not be undertaken by the treating physician unless the treating relationship is clearly disclosed in the report; and
  - Physicians should inform the subject that the report is the property of the requesting party and if they want a copy, they can obtain it from that party.
- One member of the public felt this communication is necessary to clarify the scope of the information or opinion specific to the report requested, while another member of the public felt this is important especially if follow-up is needed.
- One organizational respondent felt that whenever possible, the physician conducting the IME should have no direct treating relationship with the subject, otherwise there is a strong potential for bias.

CPSO's current *Third Party Reports* policy states "In some instances, timelines for providing reports will be set out in legislation. Absent a specific legal requirement, physicians must complete and submit third party reports within 60 days."

Q18. Please indicate how reasonable you think the following statements are: (n=143)



Q19. Please feel free to elaborate. (Optional) (n=66)

Over half of survey respondents thought that not quantifying the timeframe was reasonable:

- Several respondents felt the timeframe should be agreed upon by the parties.
- Some physician respondents suggested flexibility should be permitted to reflect the nature and complexity of the report (i.e. a five-minute checklist versus a multi-page assessment of a complex case) and that timelines may be dependent on the complexities of the case (e.g. some complex medico-legal cases can take years).

However, there were some respondents who felt "within a reasonable time" should be quantified as it would otherwise be left open to interpretation.

Several respondents indicated that the timeframe should be one to two weeks, given the financial and medical implications for the subject (i.e. income replacement, benefits, or access to treatment and support services may be dependent on the report).

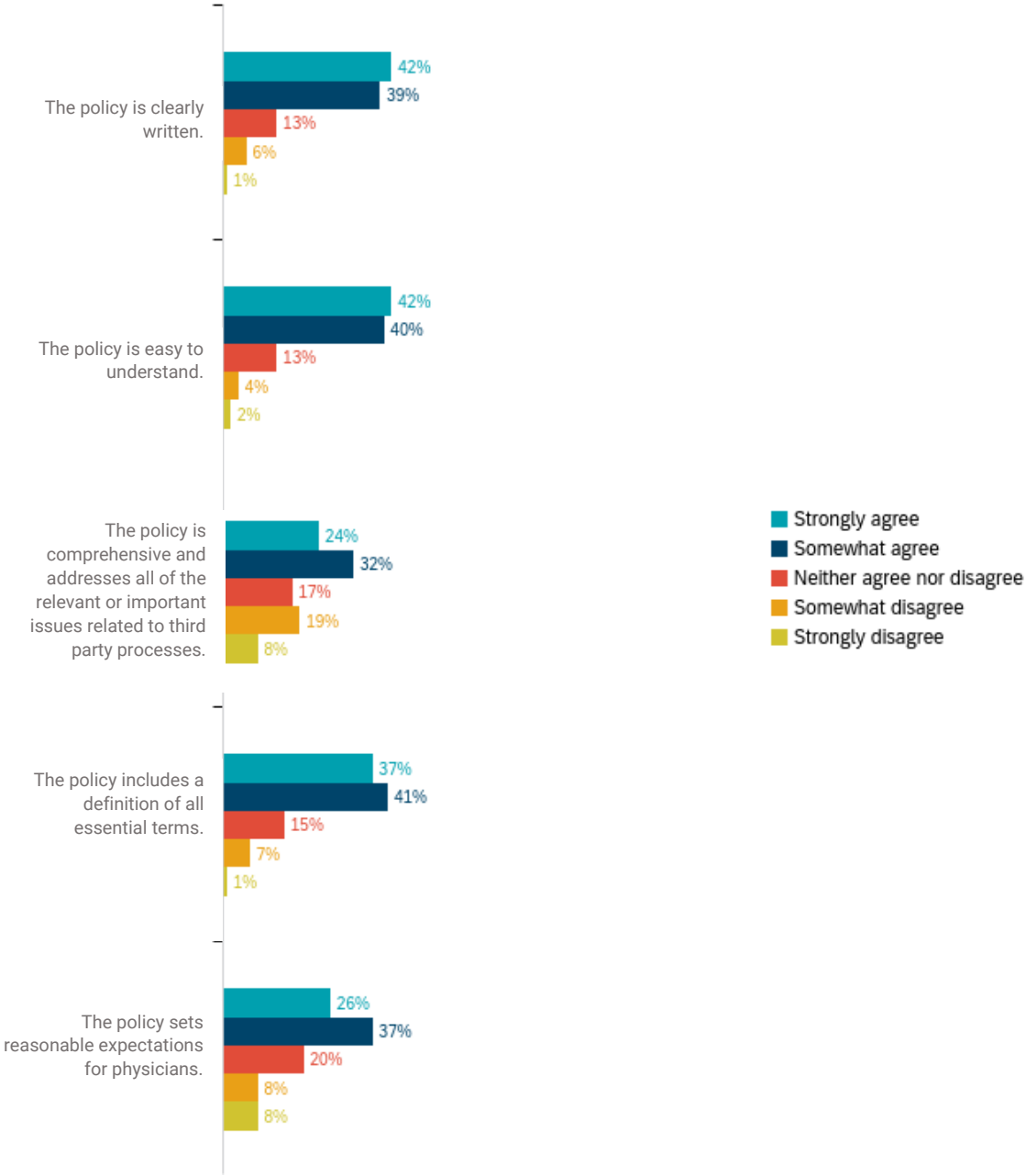
On the other hand, some physician respondents thought it was unreasonable to prepare reports within 30-days given existing workloads and commitments. Several highlighted circumstances outside the physician's control that can delay the preparation of the report (e.g. difficulty in collecting or reviewing relevant information or waiting on test results).

The following questions were only posed to survey respondents who indicated that they read the Third Party Reports policy:

We are interested to hear your thoughts about the policies and whether they are clear, comprehensive, and reasonable. The answers and comments you provide will help us determine where changes or improvements may be necessary.

We'd like to understand whether the *Third Party Reports* policy is clear, comprehensive, and reasonable.

Q20. Please indicate the extent to which you agree or disagree with each of the following statements regarding the policy. (n=106)



Q21. Please feel free to elaborate on your answers above. For example, how can we improve the policy's clarity? How can we make the policy more comprehensive? What expectations, if any, did you find unreasonable? (Optional) (n=43)

Some of the comments received were related to system-level issues that are beyond CPSO's jurisdiction. The policy-specific comments received related to clarity, comprehensiveness, and reasonableness are described below.

Comments from survey respondents related to improving the policy's clarity included:

- Clarify expectations around payment and fees (e.g. one member of the public felt subjects should only pay after a report is complete);
- Clarify which specialists or other regulated health care professionals can complete third party reports so the burden is no longer placed primarily on primary care physicians;
- Clarify if the examining physician conducting the IME is permitted to access a subject's medical record through the hospital's electronic medical record (EMR) system after obtaining their consent; and
- One physician respondent suggested the updated policy should use the terms "evaluation" over "examination" because the overall process of reviewing charts, assessing background literature, meeting subjects, taking a history, doing a physical examination, and forming an impression is not an "examination" but an "evaluation."

Feedback regarding the policy's comprehensiveness included:

- The current policy does not set out responsibilities for requesting parties nor does it address patient accountability throughout third party processes;
- The time taken to perform the IME should be recorded in the report as a common complaint is that assessments or appointments are too brief;
- If subjects are entitled to bring observers to an examination, physicians should be able to decline these observed examinations and/or specify that such examinations be recorded by professional and independent third parties;
- The expectation that physicians must disclose a suspicious finding does not account for some complex cases where privacy legislation allows for "an out" where the disclosure might cause more harm than not disclosing;
- The policy should require the disclosure of actual or potential conflicts of interest; and
- Several respondents believed that IMEs should be recorded, particularly for subjects who have sustained a brain injury and/ or are experiencing cognitive or memory deficits.
- Additional comments from members of the public included:
    - physicians should always outline the basis for their opinion;
    - information should always be shared with the subject's treating physician; and
    - subjects should always be allowed a chaperone in the examination room.

Comments received related to the policy's reasonableness included:

- While the source of information should be clearly identified in the third party report, it is unreasonable to expect the physician to determine the accuracy of this information;
- The current policy focuses too much on consent and suggested that if the subject attends for the IME, the physician can assume implied consent has been provided;

- A few health care professionals felt that the expectations are unenforceable since the policy does address consequences, deterrents, or disciplinary action that may occur; and
- One health care professional was concerned the current policy allows a physician to provide an opinion on a subject knowing they do not have all the relevant documents as long as the physician states they made a “reasonable” effort to do so.

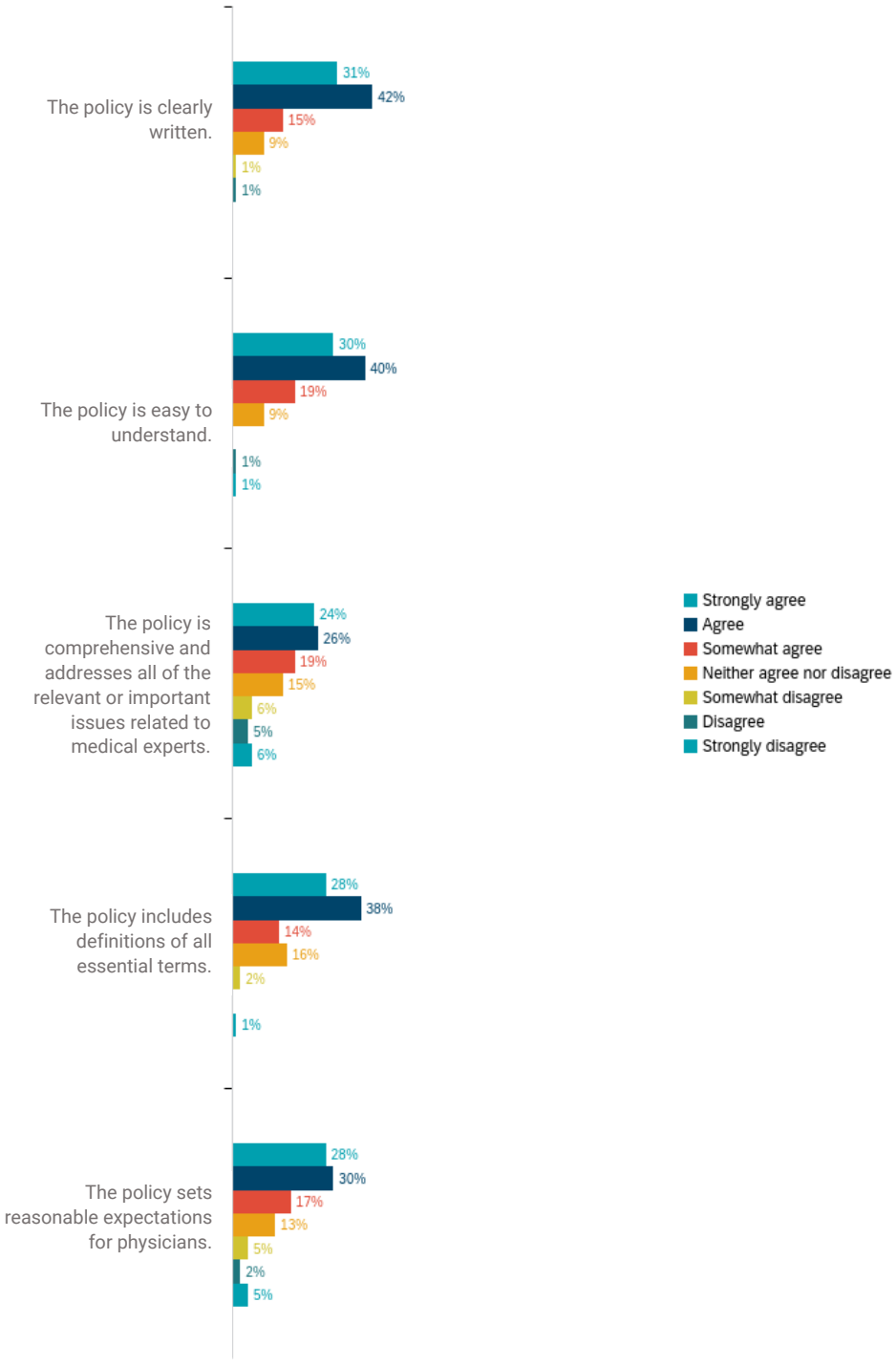
One organizational respondent suggested CPSO collaborate with the Insurance Bureau of Canada (IBC) and the Financial Services Regulatory Authority of Ontario (FSRA) to help shape the numerous service-related expectations required of physicians and what can and should be reasonable service-related expectations from the requesting party.

One health care provider suggested making the policy a living document that is amended on a more frequent basis as the policies and procedures followed by physicians who complete these assessments are updated by relevant legal decisions.

The following questions were only posed to respondents who indicated that they read the Medical Expert: Reports and Testimony policy.

We'd like to understand whether the *Medical Expert: Reports and Testimony* policy is clear, comprehensive, and reasonable.

Q22. Please indicate the extent to which you agree or disagree with each of the following statements regarding the policy. (n=86)



Q23. Please feel free to elaborate on your answers above. For example, how can we improve the policy's clarity? How can we make the policy more comprehensive? What expectations, if any, did you find unreasonable? (Optional) (n=23)

Physician respondents suggested the following to improve the policy's clarity and comprehensiveness:

- The current policy provides appropriate and expected professional standards for physicians without being overly prescriptive, but felt that CPSO should not use restrictive language regarding third party processes that may not account for exceptional circumstances or variables that could arise during a medico-legal matter;
- The updated policy should address hindsight bias; and
- Reports should clearly identify, through detailed footnotes or detailed documentary reviews, the nature and provenance of the information on which the opinion is based.

Feedback from physician respondents regarding the policy's reasonableness included:

- The expectations surrounding objectivity and impartiality (Provision 18) are unrealistic and the use of the word "must" set an unattainable bar: although biases are inherent, physicians should strive for objectivity;
- It is unnecessary to repeatedly advise physicians to obtain legal advice as Provision 2 *("Physicians are **advised** to obtain legal advice if they are unsure of their obligations in specific circumstances")* is general enough to apply throughout the policy; and
- The suggestion that physicians "must seek independent legal advice" or to contact the CMPA seems extreme for experienced medical experts who teach on these issues.

Additional comments from survey respondents to improve the policy's clarity included:

- Expectations related to experts acting for both sides require clarification;
- There are discrepancies regarding the presence of observers and audio/video recording expectations between the two current policies;
- Provision 18d ("***not** advocate for any party involved in the legal proceeding")* should be updated to read as "**not** *be an* advocate for any party involved in the legal proceeding;"
- Provision 22 *("Physicians **must** ensure that all relevant information has been considered, and that the information they rely on to form their expert opinions is accurate")* and Provision 23 *("Physicians **must** clearly express when they do not have enough information to arrive at a conclusion on a particular point, or where their opinions are otherwise qualified")* are contradictory.

The following question was posed to all survey respondents:

Q24. If you have any additional comments that you have not yet provided, please provide them below, by email, or through our online discussion forum. (Optional) (n=30)

Key comments provided by physician respondents included:

- Physicians should not be wasting their time doing unnecessary forms;
- If a report needs to be completed when they have already provided materials to the referring party on the same issue;
- Recognize that the performance of IMEs and the preparation of medico-legal reports is becoming an area of expertise that goes beyond the usual practice of most physicians;
- Not all physicians do thorough examinations and too many reports are hastily done;
- Audio recordings should be made routine;
- When a medical expert discovers an unrelated condition during a third party examination (e.g. IME), they should be allowed or encouraged to communicate this information to the subject and to the subject's primary health care provider;
- Regulate physicians who provide invalidated testing or treatment to third party subjects solely for personal gain; and
- How CPSO handles complaints (often initiated by plaintiff lawyers) of physicians completing defence medical reports.

Several respondents expressed concerns around perceived “hired guns,” referring to physicians who provide information and/or opinions that are biased and partial to the requesting party.

Additional comments from survey respondents included:

- A few members of the public felt the policy does not allow for victims of crime to address those physicians who are not completing their reports in a timely fashion and felt that the 60-day deadline is acceptable.
- One member of the public felt IMEs should not be paid for by insurance companies.
- One organizational respondent felt physicians should not be burdened by lengthy reports and review of records that have nothing to do with providing a medical opinion.
- Another organizational respondent felt clinically supported diagnoses of brain injury should be accepted; assessments should be multi-disciplinary; individuals should be assessed only once by one single health care professional; and immediate access to treatment should be allowed by eliminating denials and delays.
- One health care professional was concerned that the implementation of SCERPs is unfairly tarnishing the reputation and availability of IME assessors.
- Another health care professional felt IMEs should be recorded.